

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Original

75-7329

To be argued by
Aaron J. Broder.

United States Court of Appeals

For the Second Circuit.

LILIAM JUNCO and GUILLERMO SUAREZ-SOLIS,
as Co-Guardians of MIGUEL ANGEL JUNCO, Jr., an In-
fant under the age of 14 years, and LILIAM JUNCO,
as Administratrix and Personal Representative of the
Estates of MIGUEL A. JUNCO and ALINA S. JUNCO,
Deceased, and MIGUEL ARMANDO JUNCO, HER-
MINIA JUNCO, GUILLERMO SUAREZ-SOLIS and
MARIA PATRICIA ADELAIDE SUAREZ-SOLIS,
Plaintiffs-Appellants,

v.

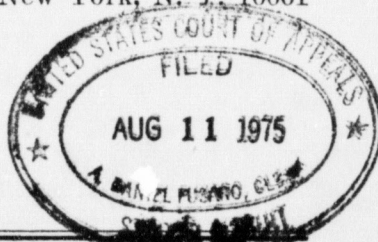
EASTERN AIR LINES, INCORPORATED,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS-APPELLANTS.

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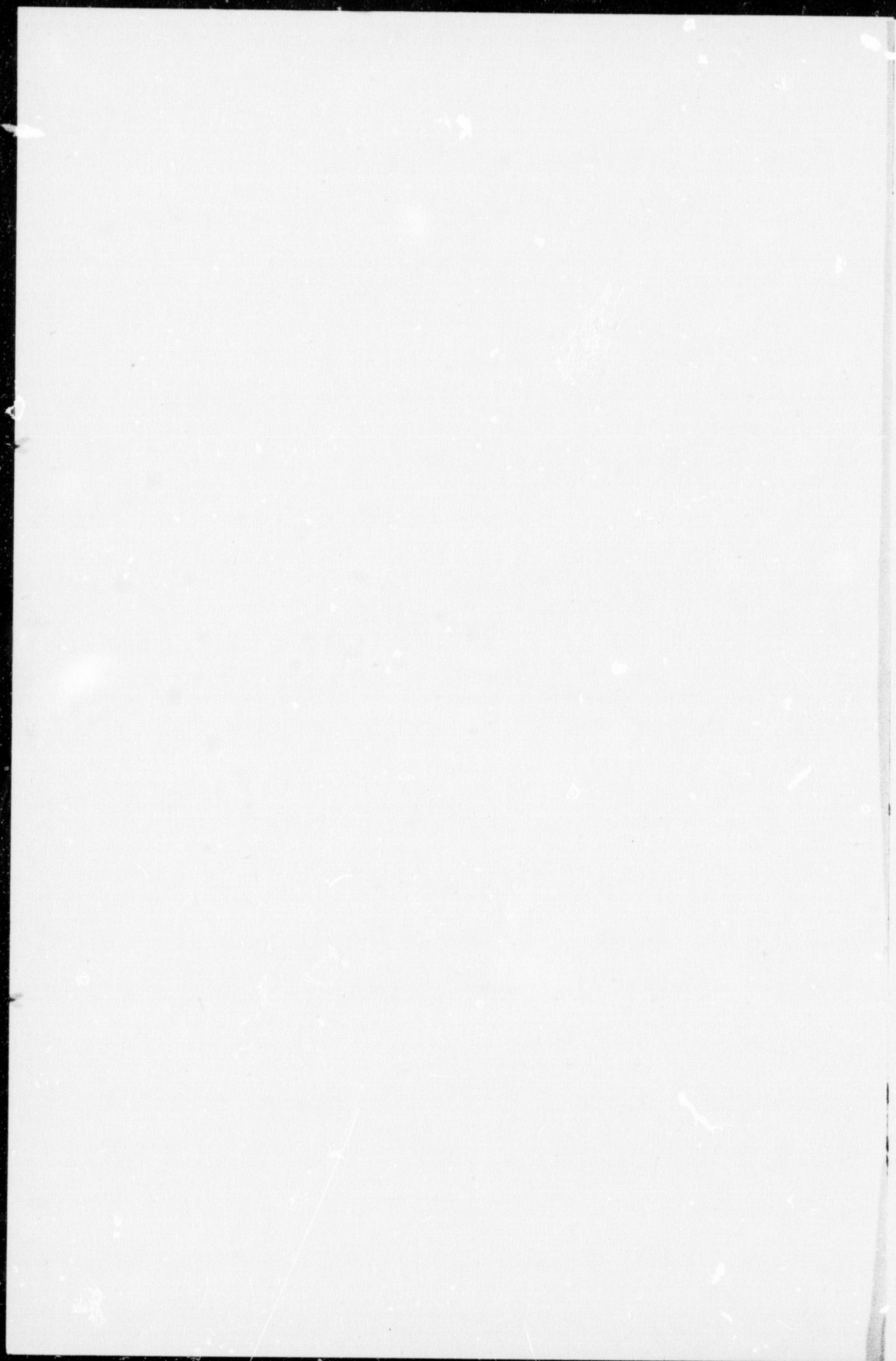


Table of Contents.

	Page
Question Certified	1
Issue Presented	1
Statement of the Case	2
Argument	4
Summary	4
POINT I. No "governmental interest" of the State of New York is served by depriving New York domiciliaries of a recovery in this wrongful death action	4
POINT II. The lower court erred in failing to give effect to the very strong New York policy against wrongful death limitations in connec- tion with New York domiciliaries in multi- state tort settings	10
POINT III. The court below misconstrued the Bab- cock rule by mechanically applying the law of the survivors' domicile on the issue of damages without inquiring into the underlying policy considerations of the survivors' domicile juris- diction in order to assess its interest in ap- plying its law, and by failing to give proper recognition to Florida public policy	15
Conclusion	26
APPENDIX A:	
Florida Wrongful Death Act	27

TABLE OF AUTHORITIES.

CASES:

	Page
Babcock v. Jackson, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279 (1963)	5, 11, 12, 15, 17, 23
Chance v. E. I. DuPont De Nemours & Company, Inc., 371 F. Supp. 439 (1974)	20, 21
Dedek v. Eastern Air Lines, Inc., U.S.D.C., S. D. Fla., Docket No. 73 Civ. 953 (1975)	11, 14, 19
Hopkins v. Lockheed Aircraft Corp. (Fla. 1967), 201 So. 2d 743	19
Hurtado v. Superior Court of Sacramento County, 114 Cal. Rptr. 106, 522 P. 2d 666 (Sup. Ct. Calif., In Bank, 1974), rehearing denied 7/10/74	12, 14
Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)	5
Neumeier v. Kuehner, 31 N. Y. 2d 121, 335 N. Y. S. 2d 64, 286 N. E. 2d 454 (1972) ..	5, 6, 7, 8, 11, 16, 17, 18
Oltarsh v. Aetna Insurance Co., 15 N. Y. 2d 111, 256 N. Y. S. 2d 577, 204 N. E. 2d 622 (1965)	23
Patch v. Stanley Works, 448 F. 2d 483 (1971)	5
Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P. 2d 727 (1967)	13

Rosenthal v. Warren, 475 F. 2d 438 (1973), cert. denied 414 U. S. 856, 94 S. Ct. 159, 38 L. Ed. 2d 106	5, 8, 9, 11, 15, 16, 17, 18, 22
Rosenthal v. Warren, 374 F. Supp. 522 (1974)	21, 22
In re Schneider's Estate, 198 Misc. 1017, 96 N. Y. S. 2d 652, aff'd on rearg. 100 N. Y. S. 2d 371 (1950)	21
Tooker v. Lopez, 24 N. Y. 2d 569, 361 N. Y. S. 2d 519, 249 N. E. 2d 394 (1969)	5, 11, 23, 24
Watson v. Employers Liab. Assur. Corp., 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1955)	24
Wyatt v. Fulrath, 16 N. Y. 2d 169, 264 N. Y. S. 2d 233, 211 N. E. 2d 637 (1965)	21

TREATISES:

Cavers, The Choice of Law Process (1965)	13
Comment, False Conflicts, 55 Cal. L. Rev. 74	13
Currie, Selected Essays on Conflicts of Laws (1963)	13
Herzog [New York], Conflicts of Laws, 18 Syracuse L. Rev. 157 (1966)	21
Kay, Comments on Reich v. Purcell, 15 U.C.L.A.L. Rev. 584	13
Juenger, Choice of Law in Interstate Torts, 118 U. Pa. L. Rev. 202	18
Laflar, R. A., American Conflicts Law (1968)	20
Reese & Rosenberg, Cases on Conflict of Law (1971)	21
Restatement of Law, Second	21



United States Court of Appeals

FOR THE SECOND CIRCUIT.

Docket No. 75-7329.

LILIAM JUNCO and GUILLERMO SUAREZ-SOLIS, as Co-Guardians of Miguel Angel Junco, Jr., an Infant under the age of 14, years, and LILIAM JUNCO, as Administratrix and Personal Representative of the Estates of Miguel A. Junco and Alina S. Junco, Deceased, and MIGUEL ARMANDO JUNCO, HERMINIA JUNCO, GUILLERMO SUAREZ-SOLIS and MARIA PATRICIA ADELAIDE SUAREZ-SOLIS,

Plaintiffs-Appellants,

v.

EASTERN AIR LINES, INCORPORATED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS-APPELLANTS.

Question Certified.

Were the rulings in the court below on the conflict of law issue correct?

Issue Presented.

Does the State of New York have an overriding "governmental interest" in applying its wrongful death statute in every multi-state death action involving a New York

domiciliary, even where it destroys the cause of action of the New York domiciliary, whereas the law of the state where the accident occurred and where the defendant is resident grants a full right of recovery to the New York domiciliary?

Statement of the Case.

This action arises out of the tragic crash of an Eastern Air Lines aircraft into the Florida Everglades while it was attempting to land at Miami International Airport on December 29, 1972.

An interlocutory memorandum and order was entered in this action on May 7, 1975, by the United States District Court for the Southern District of New York, Honorable Whitman Knapp, D. J. (32a-40a).*

Plaintiffs applied for leave to appeal from this memorandum and order pursuant to 28 U.S.C. §1292(b) and Federal Rule of Appellate Procedure 5, and leave was granted by this honorable court by order dated May 30, 1975 (41a).

This action was commenced in the United States District Court for the Southern District of New York. It was transferred pursuant to 28 U.S.C. §1407 to the United States District Court for the Southern District of Florida for the purpose of pre-trial discovery proceedings, and was thereafter consolidated with all other pending actions pursuant to 28 U.S.C. §1404 for the purpose of consolidated trial on liability.

Prior to the scheduled trial on liability, Eastern Air Lines conceded liability for compensatory damages.

*References are to pages of the joint appendix.

This action was then returned to the United States District Court for the Southern District of New York for the purpose of trial on the issue of damages only.

At the time of the plane crash, Miguel A. Junco, his wife, Alina S. Junco, and their baby son, less than a year old, were lawful passengers aboard the aircraft. The mother and father were killed in the crash, and their baby son sustained severe personal injuries.

The deceased parents and their infant son were domiciliaries of the State of New York at the time of the plane crash.

In addition to the surviving infant, the deceased mother left her surviving parents who are domiciliaries of the State of Florida; the deceased father left him surviving parents who are domiciliaries of the State of New York.

The defendant, Eastern Air Lines, maintains its principal place of business in Miami, Florida, and is overwhelmingly present there.

A number of pre-trial conferences have been held concerning the issues with respect to damages, and these issues have been narrowed in accordance with the pre-trial order consented to by counsel for both parties (16a-31a).

The issue of whether the law of the State of New York, or the law of the State of Florida, should be applied in determining the damages recoverable in this action is of vital importance in this case, because the viability of the cause of action on behalf of the New York grandparents, and the quantum of the recovery by the surviving infant for the wrongful death of his deceased mother and his deceased father, depend upon its determination.

Judge Knapp has ruled that the law of death damages of the State of New York should be applied to the surviving New York domiciliaries, stating:

"I therefore rule that New York law applies to all plaintiffs except the maternal grandparents who, as Florida residents, are entitled to plead and prove a cause of action in their own right under Florida law. Since under New York law the paternal grandparents have no cause of action, the complaint is dismissed as to them. Finally, as a result of my determination that New York law applies, the complaint will be—and is—limited to exclude any claim for damages on the part of the infant except for pecuniary loss" (33a).

Argument.

Summary.

The strong public policy of the State of New York against damage limitations in wrongful death actions brought for survivors of New York decedents requires reversal of the lower court's ruling whose effect is to deny totally any recovery by the New York grandparents and to severely limit the recovery by the New York orphaned infant.

POINT I.

No "governmental interest" of the State of New York is served by depriving New York domiciliaries of a recovery in this wrongful death action.

It is clear that since jurisdiction of this case is based on diversity of citizenship, this honorable court is bound by the choice of law rules of the State of New York,

the forum state (*Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; *Patch v. Stanley Works*, 448 F. 2d 483; *Rosenthal v. Warren*, 475 F. 2d 438, cert. denied 414 U. S. 856, 94 S. Ct. 159, 38 L. Ed. 2d 106).

It is equally clear that the State of New York uses the "governmental interest" analysis in determining, in cases involving multi-state settings, which law should govern the resolution of the specific issues raised in the litigation (*Babcock v. Jackson*, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279; *Tooker v. Lopez*, 24 N. Y. 2d 569, 301 N. Y. S. 2d 519, 249 N. E. 2d 394; *Neumeier v. Kuehner*, 31 N. Y. 2d 121, 335 N. Y. S. 2d 64, 286 N. E. 2d 454).

In this case, the tragic plane crash which cost the lives of the deceased mother and the deceased father of the infant plaintiff occurred in the State of Florida. The wrongful conduct of the defendant, Eastern Air Lines, which caused the death of the infant's parents occurred in the State of Florida. The defendant, Eastern Air Lines, maintains its principal place of business in the State of Florida, where 90% of its assets are located, the majority of its officers are based, and all of its "day to day" and "mile to mile" operations are centered. Some of plaintiffs are domiciliaries of the State of Florida and others are domiciliaries of the State of New York. The litigation was commenced in the State of New York.

Obviously, this multi-state litigation involves "choice of law" problems, and under the governmental interest analysis to which New York subscribes, the specific issues must be isolated, and determined by the law of the State having the greatest "governmental interest" in the resolution of the specific issue.

On the specific issue of liability, should the New York law (forum state) or the Florida law (place of accident) be applied? The New York Court of Appeals in *Neumeier v. Kuehner* (*supra*) has ruled that, normally, the applicable law of decision should be that of the state where the accident occurred. Thus, under the New York choice of law rule, the law of the State of Florida would be applied on the issue of liability in this case. A specific ruling on this issue was avoided, however, since, prior to trial on liability, the defendant, Eastern Air Lines, conceded liability for the crash.

On the specific issue of damages, should New York law or Florida law be applied? Here, again, the general legal principle is not in dispute: under *Neumeier*, the applicable rule of decision is that of the state where the accident occurred—*unless* it can be shown that the relevant substantive law purposes of the State of New York would be advanced by displacing that normally applicable rule and substituting instead the law of the State of New York.

Under *Neumeier*, therefore, the law of damages of the State of Florida should be applied on the issue of damages in this case. Such a ruling would be consonant with the New York decisions explicating the "interest analysis" doctrine as it is applied in the State of New York. It would also be in accordance with the strong public policy of the State of New York against damage limitations in wrongful death actions brought for New York decedents.

Applying the law of damages of the State of Florida to this case provides a recovery for both sets of grandparents of the infant, the New York grandparents as well as the Florida grandparents, and also grants recovery to the orphaned infant for mental suffering and anguish for the loss of both of his parents.

Under *Neumeier*, the law of damages of the State of New York can be applied in this case *only* if it is necessary to oust the normally applicable Florida law in order to subserve a "governmental interest" of the State of New York.

Do such special circumstances exist in this case? The effect of the substitution of the New York law of damages for that of Florida is to completely extinguish any recovery by the New York grandparents, and to diminish severely the recovery of the orphaned New York infant. Far from subserving or advancing the "governmental interests" of the State of New York, such a result is directly contrary to the strong public policy of the State of New York against damage limitations in wrongful death actions brought for New York decedents.

The court below cites *Neumeier*, but seems to misapprehend what the New York Court of Appeals said there:

"While New York may be a proper forum for actions involving its own domiciliaries, regardless of where the accident happened, it does not follow that we should apply New York law * * * *where doing so does not advance any New York State interest, nor the interest of any New York State domiciliary*" *Neumeier*, 31 N. Y. 2d 126, 335 N. Y. S. 2d 68. (Italics added.)

In other words, although the accident occurred in Florida, the New York survivors could properly sue in New York for the wrongful death of the decedents, and the normally applicable rule of decision on the issue of damages is the law of the state where the accident occurred, Florida. That normally applicable law cannot be displaced, and the New York law of damages applied, *unless* it is necessary to apply the New York damage law in order to advance the governmental interests of New York.

Judge Breitell, in his concurring opinion in *Neumeier*, spells this out in detail:

"What the *Babcock* case * * * taught and what modern day commentators largely agree is that *lex loci delictus* is unsoundly applied if it is done indiscriminately and without exception. It is still true, however, that *lex loci delictus* is the normal rule, as indeed Chief Judge Fuld noted in the *Tooker* case * * *." *Neumeier*, 31 N. Y. 2d 131, 335 N. Y. S. 2d 72.

The New York courts (as was observed in *Rosenthal*, *supra*) have without exception displaced the normally applicable rule of decision (the law of the state where the accident occurred) in those cases where the application of the law of the state where the accident occurred would subvert the governmental interests of the State of New York, by, for example, denying or limiting recovery of the New York domiciliary. Such a result would be abhorrent to the strong public policy of New York State against damage limitations in wrongful death actions, and therefore justified the displacement of the normally applicable law and the substitution therefor of the law of the State of New York.

In the same vein, *Rosenthal* states that the New York courts would not displace the normally applicable rule of decision (the law of the place where the accident occurred) *merely* to give a New York domiciliary a larger recovery. Where the law of the place where the accident occurred provides a just recovery for the New York domiciliary, New York will not consider it necessary and an advancement of its "governmental interest" to intervene and displace the normally applicable law of that state simply to give its domiciliary a larger recovery under the New York law.

There is no doubt, as the court concluded in *Rosenthal*, that were a converse situation presented in this case—i. e., that the Florida damage law would deprive New York domiciliaries of any recovery for the wrongful death of their decedent while a full recovery was provided under the New York damage law—that the New York courts would without question hold that the New York damage law should apply and the New York domiciliaries be allowed to recover:

“This review of the relevant case law leaves us with the overwhelming conclusion that * * * the strong New York public policy against damage limitations has triumphed over the contrary policies of sister states in every case where a New York domiciliary has brought suit. This conclusion is particularly striking in wrongful death actions where the New York policy, embedded in a state constitutional prohibition against damage limitations, has without exception been applied in suits brought for New York decedents *since Kilberg*.”
Rosenthal, 475 F. 2d 443.

There is no justification, therefore, in logic, reason or the very strong New York public policy against wrongful death recovery limitations, for this court to uphold the action of the lower court in arbitrarily displacing the normally applicable Florida death damages law in this case which results in the total destruction of any right of recovery of New York domiciliaries for the wrongful death of their decedent.

POINT II.

The lower court erred in failing to give effect to the very strong New York policy against wrongful death limitations in connection with New York domiciliaries in multi-state tort settings.

The court below has mistakenly applied the "governmental interest" doctrine in precisely the wooden and mechanistic manner condemned in the past with reference to the rigid and unvarying application of the *lex loci delictus* rule. The New York courts have adopted the "governmental interest" doctrine in actions having a multi-state tort setting in order to escape the *lex loci* straight jacket, so as to render a just and fair verdict in the circumstances of each individual case. The court below is in effect negating this objective.

Simply, what the court below is saying is that, in a multi-state tort situation, it is unvaryingly mandatory that the law of the domicile of the decedent and the survivors be applied to the measure of damages, since that law is most intimately concerned with that issue.

What the court below has failed to understand is that the "law of the domicile" for this purpose must be determined by consideration not just of the verbiage of the death damages statute, but of the state public policy embraced in that statute.

Further, the court below has failed to understand that, because of the nature of the public policy of the State of New York concerning death damages for its domiciliaries, it is necessary in multi-state tort situations to inquire also into the public policy of the state where the accident occurred in order to make a proper assessment of whether or not the New York "governmental in-

terest" is subserved by the application of its death damages law in the particular situation (*Babcock v. Jackson*, *supra*; *Tooker v. Lopez*, *supra*; *Neumeier v. Kuehner*, *supra*; *Rosenthal v. Warren*, *supra*).

The unfair, unjust and anomalous result of the wooden application of the law of domicile to the issue of damages in the manner exhibited by the court below in the instant case is that New York domiciliaries (the New York grandparents) are told they must travel to Florida to institute an action for death damages for the wrongful death of their son because in Florida they most definitely have a right to recover (*Dedek v. Eastern Air Lines, Inc.*, U. S. D. C., S. D. Fla., Docket No. 73 Civ. 953; this is an action for wrongful death damages arising out of this same tragic Everglades Crash, in which New York domiciliaries sued in Florida for the wrongful death of their daughter, also a New York domiciliary, in which District Court Judge Fay decided that Florida's death damage law applied to the parents' recovery).

In the instant case, the lower court has dismissed the action of the New York grandparents for the wrongful death of their New York decedent on the basis—contrary to Judge Fay's ruling—that, since they are New York domiciliaries, the New York death damage law applies to bar their recovery.

Peculiarly, the lower court permits the Florida grandparents to sue in the New York courts for the wrongful death of their New York-domiciled daughter on the basis that, since they are domiciliaries of Florida, the Florida law of damages applies to their claim and allows them a recovery.

Finally, and perhaps most anomalous of all, the infant survivor is deprived by the lower court of his cause

of action under Florida law for mental pain and grief because he was a New York domiciliary at the time of his parents' death, and, since he chose to sue in New York, the New York law of damages which does not compensate for mental pain and suffering applies to his action.

In effect, the lower court is penalizing the New York domiciliaries for suing in the New York courts for the wrongful death of their New York domiciliary decedents.

Such "unjust and anomalous results" from the inflexible application of tort rules without regard to their "relevant purposes" was roundly condemned by the New York courts and prompted their retreat from the rule of *lex loci delicti* (*Babcock v. Jackson, supra*).

That such "unjust and anomalous results" are obviated by a proper application of the "governmental interest" analysis is demonstrated by the recent case in California of *Hurtado v. Superior Court of Sacramento County*, Sup. Ct. Calif., In Bank, 114 Cal. Rptr. 106, 522 P. 2d 666, rehearing denied 7/10/74.

California has adopted the governmental interest approach in resolving issues in tort actions. In *Hurtado*, a Mexican domiciliary was killed in an accident which occurred in California. His survivors, also Mexican domiciliaries, instituted a wrongful death action in California. The defendant, a California domiciliary, argued that the Mexican law of damages, which prescribes a maximum limitation on the amount of death damages recoverable, should be applied in the suit because it was Mexico, the domicile of the deceased and his survivors, which had the dominant governmental interest in the destiny of the survivors. The California court rejected this contention, stating that it could not understand how it could be found to be in the interests of the Mexican

Government to limit the recovery of its domiciliaries in an accident which occurred in California against a California defendant. The court held that the state of domicile of a plaintiff in a wrongful death action has no interest in applying its rule of damages to a deceased domiciliary where the state where the accident occurred and where the defendant is domiciled has no governmental interest in protecting its resident defendant:

"Although the two potentially concerned states have different laws, there is still a problem in choosing the applicable rule of law where only one of the states has an interest in having its law applied. (Comment, False Conflicts, 55 Cal. L. Rev. at p. 77; *Cavers, op. cit., supra*, pp. 89-90.) 'When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied.' (Currie, Selected Essays on Conflicts of Laws [1963] p. 189.)

"The interest of a state in a tort rule limiting damages for wrongful death is to protect defendants from excessive financial burdens or exaggerated claims. (*Reich v. Purcell, supra*, 67 Cal. 3d at p. 556, 63 Cal. Rptr. 31, 432 P. 2d 727; *Cavers, op. cit., supra*, at p. 151.) As stated in *Reich* this interest 'to avoid the imposition of excessive financial burdens on [defendants] * * * is also primarily local.' (*Reich v. Purcell, supra*, at p. 556, 63 Cal. Rptr. at p. 35, 432 P. 2d at p. 731; Kay, Comments on *Reich v. Purcell*, 15 U. C. L. A. L. Rev. 584, 591-592); that is, a state by enacting a limitation on damages is seeking to protect its residents from the imposition of these excessive financial burdens. Such a policy 'does not reflect a preference that widows and orphans should be denied full recovery.' (*Cavers, op. cit., supra*, at p. 151.) Since it is the plaintiffs and not the defendants who are the Mexican residents in this case, Mexico has no interest in applying its limitation of damages—

Mexico has no defendant residents to protect and has no interest in denying full recovery to its residents injured by nonMexican defendants." *Hurtado*, 522 P. 2d 670.

In the instant case, how does Florida treat its resident defendant? This is answered in the *Dedek* case (*supra*), in which a wrongful death action for an accident which occurred in Florida was commenced in Florida against a Florida defendant by a New York domiciliary of a New York decedent. The Florida court held its resident defendant to the fullest measure of damages provided by the Florida death damages law.

Since Florida has no "governmental interest" in protecting its own resident defendant for an accident which occurred in Florida as against New York domiciliaries, how can it be said that New York has such a "governmental interest"? How can it be said that the smooth working of the interstate system is in any way adversely affected if New York gives the same treatment to its resident domiciliaries as does the State of Florida?

As in *Hurtado*, there is no genuine "conflict of law" in the instant case. This is so because New York has no "governmental interest" in depriving its residents of a full recovery in a wrongful death action, nor does it have any "governmental interest" in requiring its residents to travel 1,500 miles to find a court where they may procure such a recovery.

The lower court erred in failing to give effect to the strong public policy aspects of the "governmental interest" approach in its determination of the applicable death damages law in this case.

POINT III.

The court below misconstrued the *Babcock* rule by mechanically applying the law of the survivors' domicile on the issue of damages without inquiring into the underlying policy considerations of the survivors' domicile jurisdiction in order to assess its interest in applying its law, and by failing to give proper recognition to Florida public policy.

In his memorandum of opinion in the court below, District Court Judge Knapp states, in part:

"More specifically, the New York Court of Appeals, in *Babcock v. Jackson*, *supra*, has carefully distinguished between those cases where the defendant's exercise of due care is in issue and those cases where the sole issue is the extent of plaintiff's recovery. In the former situation, the law of the state where the tort occurred controls. * * * In the latter situation, however—where the sole issue at bar is the measure of plaintiff's damages—the court must apply the law of the place which has the dominant contacts with the parties and transaction and the superior claim for application of its law. *Id.* That place in the instant case is New York" (37a).

This statement of the law by Judge Knapp is directly contrary to this court's analysis of the governmental interest doctrine in conflicts of law problems in multi-state tort settings, as set forth in *Rosenthal v. Warren*, *supra*. It was clearly stated there that were a Massachusetts domiciliary to be killed in New York by tortious conduct, it is not at all certain that the damages to his survivors would be determined inevitably by the Massachusetts death damages law. To the contrary, *Rosenthal* states that the place where the tort is committed does have a definite interest in regulating conduct of tort-feasors, and there-

fore it is by no means clear that a New York court would apply the Massachusetts limitation on the death damages recovery.

This explodes Judge Knapp's thesis that there is a clear dichotomy in the conflicts law as applied to liability questions and as applied to damages questions. This court clearly states in *Rosenthal* that the conflicts rule as to damages is not to be applied in such an automatic fashion as indicated by Judge Knapp in his opinion below.

Obviously, the error relates to failure to take the second step in the interest analysis procedure. This is to say, the first step is to isolate the issue, and the second step is to analyze the comparative governmental interest involved in that issue. This second step requires investigation into the underlying policy considerations of the laws of the jurisdictions involved (*Neumeier v. Kuehner*, *supra*).

In the instant case, as has been demonstrated above, New York has no governmental interest in protecting a Florida defendant for a tort committed in Florida where the Florida courts allow a cause of action on behalf of New York domiciliaries.

"If this case presented the converse fact situation where the decedent was a Massachusetts domiciliary and defendant doctor and hospital New York based, it is by no means clear a New York court would apply the Massachusetts wrongful death limitation. For, in addition to its interest in providing adequate compensation to those New York domiciliaries who suffer a wrongful demise, the unlimited nature of the possible recovery in New York can be said to deter resident doctors and medical facilities from acts of malpractice. Thus, New York would have an

interest in regulating the conduct of the tortfeasors and 'it would be almost unthinkable to seek the applicable rule in the law of some other place.' *Babcock v. Jackson*, 12 N. Y. 2d 473, 483, 240 N. Y. S. 2d 743, 751, 191 N. E. 2d 284 (1962)." *Rosenthal*, Footnote 8, 475 F. 2d 445.

The clear implication of this is that no New York governmental interest is served by applying the Massachusetts law of damages to a Massachusetts domiciliary who is injured in New York by the tortious conduct of a New York defendant. Therefore, in all likelihood New York would not apply the Massachusetts wrongful death limitation upon the ground that Massachusetts would have no interest in so protecting the New York defendant.

Most significant is this court's clear demonstration in *Rosenthal* that it is not inevitable for the law of the domicile of the decedent and his next of kin to follow him into another state on the damages issue. Thus, simply because the deceased father and the deceased mother in the instant case were domiciliaries of New York does not render it inevitable that the New York law of damages be applied in this case.

The *Rosenthal* rule is eminently just, correct and sensible. Why, under the interest analysis, should a New York court limit the recovery of a Massachusetts domiciliary injured in New York where Massachusetts has no interest in limiting the recovery of its own domiciliaries?

So, too, New York has no interest in protecting a Florida defendant who commits a tort in Florida, where Florida will allow a recovery for the New York domiciliary even though New York does not (cf. *Neumeier*, 31 N. Y. 2d 128, 335 N. Y. S. 2d 70).

Florida very definitely has an interest in protecting strangers within its gates. This is not only set forth in *Rosenthal, supra*, but now-Chief Judge Breitel, in his concurring opinion in *Neumeier*, made it very clear that the state where the tort occurs is concerned not only with the event which occurred within its borders and with its own citizens, but, more to the point insofar as the case at bar is concerned, the state where the accident occurred has a definite interest in the "stranger within the gates":

"Certain it is that States are not concerned only with their own citizens or residents. They are concerned with events that occur within their territory, and are also concerned with the 'stranger within the gates' (*Juenger, op. cit. supra*, at pp. 209-210)." *Neumeier*, 31 N. Y. 2d 131, 335 N. Y. S. 2d 72.

What of Florida's interest in the instant case? First, the Florida Legislature has evinced in the strongest of terms the public policy of that state, which is to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Thus, the Florida statute states, in part:

"768.17 Legislative Intent.

"It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16—768.27 are remedial and shall be liberally construed."

The Florida statute defines "survivors" to include the decedent's parents. Therefore, the public policy of Florida

*The entire Florida wrongful death statute is reproduced in appendix A.

is to protect them, and to shift the losses resulting from the wrongful death of their son from them to the wrongdoer.

In this regard, it should be noted that the New York grandparents are elderly people, financially vulnerable, who were wholly dependent upon the support of their now dead son. Since Florida protects them, why should not New York protect them? But more to the point, why should Florida public policy in this regard be held abhorrent by a New York court when it is rational, fair and protective of the welfare of the bereaved New York parents who, if the order of the court below is permitted to stand, must go wholly uncompensated for the wrongful death of their devoted son?

Apart from the Florida public policy as enunciated in its wrongful death statute is the wholly separate consideration of the Florida conflicts rule. Florida public policy with respect to its conflicts rule is the *lex loci delicti* doctrine. For torts committed within the boundaries of the State of Florida, it is Florida public policy to apply its own law as to liability and damages (*Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967); *Dedek v. Eastern Air Lines*, *supra*).

In *Dedek*, New York parents who survived the wrongful death of their 19-year-old daughter, also a New York domiciliary, received a settlement of \$900,000 after the court ruled that the Florida law of damages applied in their action. *Dedek* was instituted in Florida, and therefore the Florida conflicts rule was required to be applied. The Florida court had no difficulty in deciding that the Florida death damages law applied in the action despite the fact that both the decedent and her parents were New York domiciliaries.

In the instant case, where the action was instituted in New York, the New York conflicts rule must be applied. In comparing the respective governmental interests on the issue of damages of New York and Florida, it is not only proper but necessary for the New York court to consider the public policy of both states. Upon such consideration, it is found that the State of Florida has a strong public policy to protect the victims of tortious conduct committed within its borders against the tort-feasor, and that the State of New York has a strong public policy against damage limitations in wrongful death actions. Therefore, since the Florida damage law provides a cause of action for the bereaved New York grandparents while the New York damage law gives them nothing, a ruling that in the instant case it is the Florida death damages law which should be applied seems unavoidable—since only such a ruling will advance the public policy of both states while yielding a rational and just result.

In the case of *Chance v. E.I. DuPont De Nemours & Company, Inc.* (U.S.D.C., E.D.N.Y. 1974), 371 F. Supp. 439, the court considered the propriety of the forum jurisdiction's reference to the conflict of laws rule of a foreign jurisdiction under the interest analysis. It concluded that New York appears to have been absorbing renvoi considerations into its interest analysis so that the conflict rule of the foreign jurisdiction is germane and relevant to a consideration of the policy of the foreign state:

"Should the state of accident (X) determine that its own law of conflicts requires it to apply the law of another state—presumably the place of manufacture (Y), if known, or the place of the manufacturer's main place of business (Z)—then the forum state's (F's) approach to renvoi becomes significant. See e. g., R. A. Leflar, American Con-

acts Law § 7 (2d ed. 1968); W. L. M. Reese and M. Rosenberg, *Cases on Conflict of Law* 63-64, 505-506, 549 (6th ed. 1971); Restatement of Law, Second, § 8. New York's law is far from crystal clear on the matter, but it appears to be characterized by the pragmatism in which theory yields somewhat, in the words of the Restatement, Second, 'to considerations of practicability and feasibility.' *Id.* § 8 (2).

"For example, in *In re Schneider's Estate*, 198 Misc. 1017, 96 N. Y. S. 2d 652 (Sur. Ct.), aff'd on rearg., 100 N. Y. S. 2d 371 (Sur. Ct. 1950) where F pointed to X, and X pointed back to F, New York avoided the potential of a perpetual impasse by applying the entire law of X and finding that X would in turn apply F's local law. Similarly, where X's rule of conflicts aimed not back to F, but to Y, New York would apparently apply all of X's law, including its rules of conflicts and utilize Y's substantive law. Cf. *Wyatt v. Fulrath*, 16 N. Y. 2d 169, 264 N. Y. S. 2d 233, 211 N. E. 2d 637 (1965) (to solve an estates problem New York looked to England, which in turn would have applied Spanish Law; renvoi not mentioned); Herzog, [New York] *Conflicts of Laws*, 18 *Syracuse L. Rev.* 157, 168, n. 74 (1966) (interpreting *Wyatt* as representing New York's view; 'court used the renvoi doctrine directly').

"More recently, New York seems to have been absorbing renvoi considerations into its interest analysis. Thus, the fact that X would not apply its own law is but one factor to be considered in determining whether it is F's, X's or Y's substantive law that should apply." *Chance*, 371 F. Supp. 446.

Rosenthal has yielded a further opinion recently (*Rosenthal v. Warren*, U.S.D.C., S.D.N.Y. [1974] 374 F. Supp. 522). The issue was whether the Massachusetts charitable immunity doctrine foreclosed the plaintiff from suing in New York because of the charitable status of

the defendant hospital. Applying this court's standards as set forth in the earlier opinion, District Judge Bauman rejected the proffered defense, quoting Judge Oakes' formulation of the test to be applied:

"* * * as we view it, the New York courts would balance against the New York interest in protecting its domiciliaries against wrongful death limitations the interest of Massachusetts in limiting damages for wrongful deaths allegedly caused by Massachusetts citizens or occurring in Massachusetts." *Rosenthal v. Warren*, 475 F. 2d at 444." *Rosenthal*, 374 F. Supp. 523.

Again, the absolute dichotomy which Judge Knapp finds to exist between the law to be applied on the issue of damages and the law to be applied on the issue of liability under the governmental interest analysis is not borne out. Judge Bauman considered the contention made by the defendant hospital that the charitable immunity doctrine goes to the very question of liability whereas the prior ruling of the court concerned only the amount of damages recoverable, and concluded that this was truly a distinction without a difference, saying bluntly:

"First, defendant contends that, while the Massachusetts wrongful death statute dealt only with the 'amount' of damages recoverable, the charitable immunity doctrine goes to the very question of 'liability.' On this basis, it is argued, the Court of Appeals decision in *Rosenthal* is distinguishable. I do not agree. The New York courts do not make the distinction urged by defendants and there is no reason why I should do so." *Rosenthal*, 374 F. Supp. 529.

Judge Knapp's ruling completely destroys the right of recovery of the New York-domiciled grandparents for the wrongful death of their son. The effect of

Judge Knapp's ruling is to thwart the governmental interest of Florida, which grants a right of recovery to the New York grandparents against its own Florida resident defendant. Judge Knapp's ruling at the same time thwarts also the governmental interest of New York, which has a very strong public policy against damage limitations in wrongful death cases.

What, then, is the justification for a result which is so unjust, irrational and opposed to common sense?

Babcock discarded the theretofore "inflexible traditional rule" because it failed "to take into account essential policy considerations and objectives," and therefore led to "unjust and anomalous results" (*Babcock*, 12 N. Y. 2d 484, 240 N. Y. S. 2d 751).

That New York has no interest in destroying a cause of action of its own domiciliary for injuries incurred in a foreign jurisdiction by reason of the tortious conduct of a resident of that foreign jurisdiction is demonstrated in the case of *Oltarsh v. Aetna Insurance Co.* (15 N. Y. 2d 111, 256 N. Y. S. 2d 577, 204 N. E. 2d 622 [1965]), cited with approval in *Tooker v. Lopez, supra*.

In *Oltarsh*, a New York resident suffered personal injuries while in Puerto Rico. Upon her return to New York, she commenced a direct action against the insurance carrier, who did business both in New York and in Puerto Rico. New York had no comparable statute and permitted direct action against an insurance carrier only to enforce a judgment. The *Tooker* court noted:

"* * * New York had no interest in applying its own law which first required an unsatisfied judgment against the tort-feasor before a suit was commenced against the insurance company. On the

other hand, Judge Fuld, speaking for the [*Oltarsh*] court, noted that 'Puerto Rico has a legitimate interest in safeguarding the rights of any persons injured within its borders. Enactment of the statute emphasizes the Commonwealth's understanding that such injured persons might have to be cared for by it (or its inhabitants) and evidences its intention that certain and prompt compensation, from the tort-feasor's insurer, be available both to those injured and to those who care for them. What the Supreme Court wrote in *Watson v. Employers Liab. Assur. Corp.* (348 U. S. 66, p. 72, 75 S. Ct. 166, p. 170 [99 L. Ed. 74], *supra*), is to the point (p. 72, 75 S. Ct. p. 170): 'Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages.' (15 N. Y. 2d p. 117, 256 N. Y. S. 2d p. 581, 204 N. E. 2d p. 625, *supra*.)" *Tooker*, 24 N. Y. 2d 582, 301 N. Y. S. 2d 530.

Oltarsh, supra, underscores what was said in the *Rosenthal* case by this honorable court—to wit, that the situs of the injury gives birth to an interest in the recovery of the injured. In the instant case, the infant was injured in Florida, and both of his parents were killed there—therefore under the reasoning of *Oltarsh* and *Tooker*, the interest analysis doctrine requires that the survivors be granted their rights of recovery under the Florida law.

Reduction of the highly sophisticated and sensitive approach of the governmental interest analysis for the solu-

tion of the complicated problems posed in multi-state tort situations to a simplistic formula which can be easily and uniformly applied is undeniably attractive. The courts, however, have already had such a simplistic, uniform formula in the *lex loci* rule—and have rejected it because in practice the results have proved not to be rational, sensible, just nor practical.

If this court determines that the interest analysis doctrine requires the dismissal of the New York grandparents' case, and the severe limitation of the infant's recovery, then perforce New York residents must undertake a pattern of forum shopping in order to secure their rights. This result is neither just nor practical, and is certainly not in aid of the smooth working of the interstate system in tort actions involving multi-state settings.

How is it possible for a New York court to rationalize a result which completely denies any recovery to its own New York domiciliary grandparents but permits a full recovery to the Florida domiciliary grandparents?

It is respectfully submitted that a false conflicts question is presented in this case; that the governmental interests of the State of New York and of the State of Florida are identical in that both are concerned with the protection and welfare of the survivors in a wrongful death action; that, since Florida has no governmental interest in protecting its own resident defendant in a wrongful death action, then New York certainly has no governmental interest in protecting such nonresident defendant in a wrongful death action; and that a just and fair resolution of the issue presented in this case thus requires the application of the Florida damages law.

Conclusion.

For the reasons set forth above, this court should reverse the ruling of the District Court that the New York law of death damages applies to all plaintiffs except the Florida grandparents, and direct that Florida law applies to all plaintiffs on the issue of death damages in this case.

July 31, 1975.

Respectfully submitted,

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APPENDIX A.**Florida Wrongful Death Act.****38.16 Short title**

Section 768.16-768.27 may be as the "Florida Wrongful Death Act."

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

768.17 Legislative intent

It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Section 768.16-768.27 are remedial and shall be liberally construed.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

768.18 Definitions

As used in §§ 768.16-768.27:

(1) "Survivors" means the decedent's spouse, minor children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

(2) "Minor children" means unmarried children under twenty-one (21) years of age.

(3) "Support" includes contributions in kind as well as money.

(4) "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the identity of

the decedent and survivor and shall be determined under the particular facts of each case.

(5) "Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. "Net business or salary income" is the part of the decedent's probable gross income after taxes excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

768.19 Right of action

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

Cross References

Breach of warranty, see §672.314 *et seq.*

Felonies, defined, see §775.08.

Offenses on navigable waters, see c. 861.

Survival of actions, generally, see §46.021.

768.20 Parties

The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the

decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

Cross References

Guardianship law, see c. 744.

Parties, generally, see Civil Procedure Rule 1.210.

Survival of actions, generally, see §46.021.

768.21 Damages

All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Evidence of remarriage of the decedent's spouse is admissible. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. If the decedent's survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

Subsection (2) (c), relating to the admissibility of evidence of remarriage of the decedent's surviving spouse, as added by floor amendment, was redesignated as the second sentence of the introductory paragraph in Fla. St. 1972, Supp.

768.22 Form of verdict.

The amounts awarded to each survivor and to the estate shall be stated separately in the verdict.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

768.23 Protection of minors and incompetents

The court shall provide protection for any amount awarded for the benefit of a minor child or an incompetent pursuant to the Florida guardianship law.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

Cross References

Florida Guardianship Law, see c. 744.

Survival of actions, generally, see §46.021.

768.24 Death of a survivor before judgment

A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his death. The personal representative shall pay the amount recovered to the personal representative of the deceased survivor.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

Cross References

Substitution of parties, survival of actions, generally, see Civil Procedure Rule 1.210.

Survival of actions, generally, see §46.021.

768.25 Court approval of settlements

While an action under this act is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or an incompetent shall be effective unless approved by the court.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

768.26 Litigation expenses

Attorney's fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amounts awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

768.27 Effective date

Sections 768.16-768.27 shall take effect on July 1, 1972, and shall not apply to death occurring before that date.

Added by Laws 1972, c. 72-35, § 1, eff. July 1, 1972.

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Attorney for

